Supreme Court, U.S.
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89-111

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

DEERE & COMPANY

Petitioner,

v.

ELIZABETH M. HENSGENS, *et al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986) and Federal Rule of Civil Procedure 15(C) apply in a matter originally filed in state court and subsequently removed to federal court on the basis of diversity jurisdiction?

PARTIES TO THE PROCEEDING

Elizabeth M. Hensgens

Elizabeth M. Hensgens as mother and representative of the minors Carl Jude Hensgens, Brian Keith Hensgens, and Catherine Elaine Hensgens

Mary Elizabeth Hensgens

Craig Robert Hensgens

Charles Hensgens, III

Deere & Company

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JOHN DEERE CORPORATION

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v.

ELIZABETH M. HENSGENS, *et al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Deere & Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on April 12, 1989, and to affirm the judgment of the United States District Court for the Western District of Louisiana entered on May 11, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported in an official reporter. It appears in the Appendix ("App.") at 1a to 7a. The Judgment of the United States District Court for the Western District of Louisiana granting Deere & Company's

motion for summary judgment does not appear in an official reporter but appears in the App. at 23a. Likewise, the ruling of the District Court for the Western District of Louisiana, granting Deere & Company's motion for summary judgment, is not reported in an official reporter and appears in the App. at 27a. The ruling of the Fifth Circuit denying petitioner Deere & Company's Petition for Rehearing and Suggestion for Rehearing En Banc appears in the App. at 7a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 12, 1989. App. at 8a. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Fifth Circuit on May 12, 1989. App. at 8a. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1) (1982).

RULE INVOLVED

Federal Rule of Civil Procedure 15(C) provides as follows:

> (C) Relation Back of Amendments.
>
> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1)

has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

STATEMENT OF THE CASE

On March 6, 1985, Mr. Charles Hensgens, Jr. was killed in an accident that allegedly occurred while attempting to start his John Deere Model 8630 tractor. Respondent Mrs. Elizabeth M. Hensgens, wife of the deceased, and their six children brought suit on February 25, 1986, in the Fifteenth Judicial District Court of the State of Louisiana naming "John Deere Corporation," a non-existing entity, as the sole defendant as the alleged manufacturer of the tractor. Deere & Company received service of the Hensgens' original petition for damages and two copies of citation in relation thereto on April 28, 1986, accompanied by a transmittal letter from the Hensgens' attorney Leslie J. Schiff. In response, Deere & Company filed in the Fifteenth Judicial District Court an Exception of Insufficiency of Citation and Insufficiency of Ser-

vice of Process since the only defendant named in the original petition, John Deere Corporation, was a non-existent entity.

Deere & Company removed the matter to the United States District Court for the Western District of Louisiana, Lafayette-Opelousas, Division, on May 27, 1986, on the basis of diversity jurisdiction existing between all parties. The order mandating removal was executed on May 28, 1986.

On June 3, 1986, after the matter was removed to federal court, the Hensgens filed their First Amendment Petition in the Fifteenth Judicial District Court naming Deere & Company as a defendant. Deere & Company received the First Amending Petition, a second copy of the original petition, two copies of citation, and a transmittal letter from the Hensgens' attorney Leslie J. Schiff on June 9, 1986. On November 4, 1986, the Hensgens filed a Second Amended Complaint naming Gueydan Tractor and Equipment, Inc. as a co-defendant as the alleged seller of the tractor. By Order signed ex parte on November 6, 1986, the district court permitted the Hensgens to file their Second Amended Complaint.

Deere & Company filed a Motion for Summary Judgment on November 26, 1986, and Gueydan Tractor and Equipment, Inc. filed a similar Motion for Summary Judgment on December 16, 1986. The United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, Hon. F.A. Little, Jr., presiding, granted Deere & Company's and Gueydan Tractor and Equipment, Inc.'s Motions for Summary Judgment on February 19, 1987, and March 4, 1987, respectively. On April 3, 1987, the court denied the Hensgens' motion for reconsideration, and the Hensgens filed a Notice of Appeal on April 8, 1987.

On December 17, 1987, the Fifth Circuit Court of Appeals vacated the judgments of February 19, 1987, and March 4,

1987, of the United States District Court for the Western District of Louisiana for lack of subject matter jurisdiction created by the addition of Gueydan Tractor and Equipment Company, Inc. as a defendant which destroyed the court's diversity jurisdiction. *Hensgens v. Deere & Company*, 833 F. 2d 1170 (5th Cir. 1987). The Fifth Circuit Court of Appeals additionally vacated the district court's Order of November 6, 1986, allowing the Hensgens to file their Second Amended Complaint adding Gueydan Tractor and Equipment Company, Inc. as a defendant; and the Fifth Circuit Court of Appeals remanded the matter to the district court for consideration of whether justice required the Court to allow the Hensgens to amend their complaint to add Gueydan Tractor and Equipment Company, Inc. as a defendant.

On January 25, 1988, the Hensgens moved to amend their complaint to add Gueydan Tractor and Equipment Company, Inc. as a defendant in this matter, which motion was considered and denied in Reasons for Ruling of March 10, 1988. On March 24, 1988, Deere & Company re-urged its Motion for Summary Judgment on the same grounds as was urged in its initial Motion for Summary Judgment. On May 10, 1988, the district court granted Deere & Company's Motion for Summary Judgment dismissing the Hensgens' claim against it with prejudice, which Judgment was entered on May 11, 1988.

On May 4, 1988, the Hensgens filed a Motion to Remand the matter to state court, which motion was denied by the district court on May 12, 1988. On June 6, 1988, the Hensgens filed a Notice of Appeal with the Fifth Circuit Court of Appeals.

On April 12, 1989, the Fifth Circuit affirmed the district court's denial of the Hensgens' Motion to Add Gueydan Tractor and Equipment Company, Inc. as a defendant. But the Court applied Louisiana Law to the question of whether the

amending complaint naming Deere & Company as a defendant related back to the filing date of the original petition naming "John Deere Corporation," a non-existent entity, as a defendant, rather than following *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), and applying Fed. R. Civ. P. 15(C), which is clearly mandated by the *Fortune* case. On the basis of state law, the Fifth Circuit reversed the district court's grant of summary judgment to Deere & Company. The Fifth Circuit additionally remanded the case to the district court for further proceedings consistent with the opinion. The Fifth Circuit denied petitioner Deere & Company's Petition for Rehearing and Suggestion for Rehearing En Banc on May 12, 1989.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit, in failing to apply Fed. R. Civ. P. 15(C) and in failing to follow *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), a case with facts virtually identical to this matter, mandates the application of state procedural law rather than the Federal Rules of Civil Procedure to procedural issues in federal cases removed from state to federal court. Moreover, the decision limits the holding of the *Fortune* case to exclude unreasonably its application to cases removed from state to federal court.

Louisiana law provides a one year "prescriptive" or statute of limitations period for a wrongful death action which begins on the date of death. La. Civ. C. art. 2315. It is undisputed that the Hensgens filed their original petition within one year; that no defendant was served within one year; and that Deere & Company was served with the petition naming "John Deere Corporation," a non-existent entity without capacity to bring suit or be sued, as a defendant therein on April 28, 1986, well beyond the one year anniversary date of the accident. Fed.

R. Civ. P. 15(C) governs the relation back of an amendment to correct a misnomer in pleadings in a diversity action in federal court. *Schiavone v. Fortune, supra; Skidmore v. Syntex Laboratories, Inc.*, 529 F. 2d 1244, 1249 (5th Cir. 1976). Fed. R. Civ. P. 15(C) additionally governs in matters initially filed in state court and subsequently removed to federal court pursuant to diversity jurisdiction. *Schiavone v. Fortune, supra; Bryant v. Ford Motor Company*, 832 F. 2d 1080, 1095 (9th Cir. 1987); *Ringrose v. Engelberg Huller Company, Inc.*, 692 F.2d 403 (6th Cir. 1982); *Norton v. International Harvester Company*, 627 F.2d 18 (7th Cir. 1980); *Wentz v. Alberto Culver Company*, 294 F. Supp. 1327 (D. Mont. 1969). In fact, two decisions decided since the *Fortune* case, *Smith v. Navistar International Transportation Corporation*, 687 F. Supp. 201 (D. Md. 1988), and *Gannon v. Parmeco, Inc.*, 695 F. Supp. 363 (S.D. Ohio 1988), both applied Fed. R. Civ. P. 15(C) in matters initially filed in state court, removed to federal court pursuant to diversity jurisdiction and followed the *Fortune* case in granting the defendants' motions for summary judgments that the claims were time barred. Finally, it is well settled that matters removed from state to federal court must be treated as though originally commenced in federal court. *McIntyre v. K-Mart Corp.*, 794 F. 2d 1023 (5th Cir. 1986); *Seale v. Industrial Electric, Inc.*, 362 F. 2d 788, 789 (5th Cir. 1966).

Fed. R. Civ. P. 15(C) provides in pertinent part:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for

> commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

This Court in *Schiavone v. Fortune* determined that relation back under Rule 15(C) depends on the satisfaction of four factors:

> "(1) [T]he basic claim must have arisen out of the conduct set forth in the original pleading;
>
> (2) The party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
>
> (3) That party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
>
> (4) The second and third requirements must have been fulfilled within the prescribed limitations period."

106 S. Ct. at 2384. This Court applied the "plain language" of Rule 15(C) in *Fortune* and refused to allow the relation back of an amended complaint in a factual situation that is virtually identical hereto. 106 S. Ct. at 2385.

In *Fortune*, plaintiff brought suit for libel resulting from the May 1982 publication of "Fortune" magazine. The complaint named Fortune as a defendant and was filed within the applicable one year statute of limitations, but service was not effected on Time, Inc. within the one year period. Time's

agent for service of process even refused service because Time, Inc. was not named as a defendant in the complaint. Plaintiff then amended the complaint to name Time, Inc. as a defendant and served Time, Inc. subsequently.

Time, Inc. then filed a motion to dismiss the amending complaint on the ground that it did not relate back to the date on which the original complaint was filed and as such was barred by the one year statute of limitations. The district court granted the motion and the United States Court of Appeals for the Third Circuit affirmed. This Court affirmed the Third Circuit, finding that the lack of notice to Time, Inc. of the institution of suit within the applicable statute of limitations period precluded the application of Fed. R. Civ. P. 15(C). This Court declined to apply the "identity of interest" exception which would allow the substitution of a subsequently named and sufficiently related party in a complaint after the limitations period had expired. 106 S. Ct. at 2384. The party that had been improperly named as a defendant initially, Fortune, had not received notice of the institution of the action before the limitations period had run. Thus, notice could not be imputed to Time, Inc. *Id.* The facts in the instant matter are identical hereto. The Hensgens filed their original petition naming "John Deere Corporation" as the only defendant within the one year prescriptive or statute of limitations period, but the petition was not served on Deere & Company until well beyond the one year anniversary date of the accident. Thus, no notice whatsoever of the filing of the petition was transmitted to any party until after the statute of limitations period had run.

In *Fortune,* this court decided that since Time, Inc.'s first notice of the fact that suit had been instituted against it occurred after the expiration of the applicable limitations period, then Time did not receive notice "within the period provided

by law for commencing the action against'' it as is required under Rule 15(C). This Court explained as follows:

> ''Under Rule 15(C), the emphasis is upon 'the period provided by law for commencing the action against' the defendant. An action is commenced by the filing of a complaint, and, so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983 [the expiration date of the applicable statute of limitations].''

106 S. Ct. at 2385.

The basic claim in the Hensgens' amended petition unquestionably arose out of the conduct set forth in the original petition. Deere & Company, however, received no notice whatever of the institution of suit within the applicable prescriptive period. Deere & Company therefore had no possible way of knowing, within the prescriptive period, that but for a mistake concerning the identity of the party named as a defendant in the petition, the action would have been brought against it.

The *Fortune* decision of this Court stands for the proposition that actual notice of the institution of the action ***must*** be given to the party ***named as a defendant*** within the statute of limitations period. 106 S. Ct. at 2384. The decision clearly speaks in terms of notice of the filing of the complaint:

> ''[N]either Fortune nor Time received ***notice of the filing*** until the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time.'' (Emphasis added).

106 S. Ct. at 2384. In the matter at bar, Deere & Company's first intimation of the institution and maintenance of the Hensgens' lawsuit occurred after the one year anniversary date

of the accident. Only on April 28, 1986, did Deere & Company receive service of the original petition naming "John Deere Corporation" as the sole defendant. Only on June 3, 1986, was the amended petition filed in state court, after the matter had been removed properly to federal court, which petition named Deere & Company as a defendant therein. And only on June 9, 1986, was the amending petition naming Deere & Company actually served on Deere & Company.

The *Fortune* decision clearly applies Rule 15(C) to a situation that has traditionally been defined as a "misnomer" as the dissenting opinion indicates:

> "[T]he technical correction filed in July added absolutely nothing to any party's understanding of 'the party against whom' the claims were asserted -- not to the plaintiffs' understanding, of course, and certainly not to Time, Inc.'s understanding, as its agent's letters in May made clear . . . By any standard of fair notice, the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling, or perhaps a reference, to 'Time, Inc.' instead of 'Time, Incorporated'."

106 S. Ct. at 2387-88. The majority in *Fortune* follows the weight of federal authority that an amendment merely correcting a "misnomer" nonetheless changes the party against whom a claim is asserted; thus, all of the elements of Rule 15(C) must be satisfied for an amendment to relate back thereunder.

A visual examination of the model 8630 tractor at issue herein reveals clearly the correct name of Deere & Company. During assembly of all Model 8630 Deere tractors, including

the tractor at issue in this matter, a serial number plate is affixed to the rear of the transmission case. This serial number plate is not located "inside" of the tractor nor is it located under the hood of the tractor. Rather, it is just as identifiable from a casual inspection as the "John Deere" logo. The serial number plate bears the tractor's chassis serial number and is visible without any disassembly of the tractor. The serial number plate clearly bears the following statement: "John Deere Waterloo Tractor Works of Deere & Company, Waterloo, Iowa."

In *Fortune*, the plaintiff attached to the complaint a copy of Fortune magazine's cover for its May 31, 1982, issue. This Court remarked thereon:

> "We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint. This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication."

106 S. Ct. at 2383-84. A visual examination of the Model 8630 Deere tractor involved herein reveals that Deere & Company of Waterloo, Iowa, was its manufacturer. The Hensgens' purchased the model 8630 Deere & Company tractor at issue several years before the accident and it had remained in their possession and under their control through the time of the accident and to the present. Moreover, the Hensgens could have ascertained the proper identity of the manufacturer of the Model 8630 tractor by telephone inquiry with the local seller, Gueydan Tractor and Equipment Company, Inc., from whom they purchased the tractor and with whom they were personal friends as they have admitted and which was the

reason given for their not filing suit against Gueydan Tractor and Equipment Company, Inc., initially.

In *Fortune,* Time, Inc.'s refusal of service of plaintiff's complaint is an immaterial difference from the situation herein. Rather, this Court places emphasis on the fact that the proper defendant had no notice of the institution of the lawsuit against it within the applicable limitations period:

> "The linchpin is notice, and notice within the limitations period."

106 S. Ct. at 2835. Thus, even if Time's registered agent for service of process had accepted the service, Time would not have received notice of the institution of suit against it within the applicable limitations period.

It is undisputed that the Hensgens' original petition was not served on any defendant within the one year anniversary date of the accident. There is no dispute that the Hensgens' original petition named a non-existent corporation, "John Deere Corporation," an entity without the capacity to sue or be sued, as the sole defendant therein. Deere & Company had no notice of the institution of the Hensgens' lawsuit "within the period provided by law for commencing the action against it" as is required under Rule 15(C) and which is mandated in *Fortune*. Applying Rule 15(C) as mandated by the *Fortune* case, the Hensgens' amended petition filed in state court following proper removal of the matter to federal court, which petition for the first time named Deere & Company as a defendant, clearly does not relate back to the date on which the Hensgens' original petition was filed in state court.

The decision of the Fifth Circuit relying on Louisiana law as to "misnomers in pleadings" is clearly part of the larger issue of whether the amended petition naming Deere & Company as a defendant relates back to the filing date of the original

petition naming "John Deere Corporation" as a defendant. It is clear that the Fifth Circuit's failure to apply Rule 15(C) in the matter in effect is the application of state procedural law rather than the Federal Rules of Civil Procedure to a clearly procedural issue in a matter removed from state to federal court. The decision constitutes authority for the proposition that state procedural laws are applicable to removed cases in federal court. Moreover, the effect of the Fifth Circuit's decision is to limit the holding in *Fortune*, which concerns the interpretation of Rule 15(C), exclusively to cases filed originally in federal court and to exclude its application to cases removed from state to federal court. There is no justification for this limitation contained within the decision itself. In addition, federal jurisprudence is clear that once a matter has been removed from state to federal court, it is treated as though it originally commenced in federal court which includes the application of the Federal Rules of Civil Procedure to govern procedural issues. *McIntyre v. K-Mart Corp., supra; Bryant v. Ford Motor Company, supra; Schiavone v. Fortune, supra.* Unless reversed, the Fifth Circuit's decision will be authority for federal courts to apply state procedural rules to matters pending in federal court that have been removed from state court. The decision unreasonably sanctions the application of one set of procedural rules to cases removed from state to federal court and another set of procedural rules to cases filed in federal court originally. There is no authority in the federal jurisprudence for such a distinction. Nor does the *Fortune* decision imply such a result. Accordingly, the Fifth Circuit's decision applying Louisiana procedural law regarding the relation back of an amended complaint to the date of the filing of the original complaint should be reversed on the ground that pursuant to Rule 15(C), the amended complaint naming Deere & Company as defendant does not relate back to the filing date of the original petition and is thus time barred.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

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APPENDIX A

Elizabeth M. HENSGENS, Individually, Etc., et al, Plaintiffs-Appellants,

v.

DEERE & COMPANY, Defendant-Appellee.

No. 88-4396.

United States Court of Appeals,
Fifth Circuit.

April 12, 1989.

* * * * *

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM, GARWOOD, and JOLLY, Circuit Judges.

WISDOM, Circuit Judge:

In this case the original complaint named *John Deere Corporation* as the defendant. The defendant's correct corporate name is *Deere & Company*. This misnomer raises the question whether under Louisiana law the complaint, timely filed in a court of competent jurisdiction and venue, interrupted the one-year liberative prescription applicable to delictual actions. We conclude that the misnaming of the defendant in the original complaint was not so egregious as to compel the court to void the effect of a timely filed suit to interrupt prescription of the plaintiff's claim.

I

The facts relevant to this appeal are undisputed.[1] On March 6, 1985 Charles Hensgens, Jr. was killed when he jump-started his tractor in gear and it rolled over him. Elizabeth Hensgens, his widow, filed suit, individually and on her children's behalf, in a Louisiana state court on February 25, 1986. The suit was against John Deere Corporation, certainly a name very similar to but not the exact name of the defendant. The citation was served on April 28, 1986 on Deere & Company, a Delaware Corporation not qualified to do business in Louisiana or registered with the Secretary of State. Deere & Company filed a petition to remove the suit to federal court on May 27, 1986. Hensgens amended her petition to name Deere & Company as the defendant on June 3, 1986 and on June 9, 1986 the amended petition was served on the defendant by certified mail in accordance with the Louisiana Long Arm Statute. The plaintiff later amended her petition to add as a defendant Gueydan Tractor and Equipment Co., from whom Hensgens had bought the tractor.

The district court granted summary judgment in favor of both defendants on the ground that the plaintiff's suit was barred by Louisiana's one-year prescriptive period for torts. On appeal this Court vacated the judgment for lack of subject matter jurisdiction and remanded the case to the district court to consider whether the addition of Gueydan, a nondiverse party, was proper. On remand, the district court denied the plaintiff's motion to add Gueydan and again granted summary judgment to Deere & Company on its prescription argument.

[1, 2] In its second order granting Deere & Company summary judgment the district court ruled that under Fed.R.Civ.P.

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[1]A summary of the facts at the time of the first appeal in this case can be found in *Hensgens v. Deere & Co.*,833 F.2d 1179 (5th Cir. 1987).

15(c) and the Supreme Court's recent opinion in *Schiavone v. Fortune*,[2] the plaintiff's amended petition changing the name of the party sued from "John Deere Corp." to "Deere & Company" did not relate back to the date the original petition was filed, and therefore, the plaintiff's claim was time-barred. We agree with the district court and the defendant that federal law regarding relation back of amendments to pleadings is controlling in diversity cases in federal court. Relation back of the amendment, however, is not a disputed issue in this case — if the filing of the original petition interrupted prescription. Whether the plaintiff's original petition naming John Deere Corp. as the defendant interrupted prescription against Deere & Company is a question to be resolved by Louisiana substantive law.

II

[3] In diversity cases, of course, federal courts apply state statutes of limitations and related state law governing tolling of the limitation period.[3] The Louisiana Civil Code provides:

> Delictual actions are subject to a liberative prescription of one year.

La.Civ.Code Ann. art. 3492 (West Supp. 1989).

The methods of interrupting this prescriptive period are set forth in Civil Code article 3462:

> Prescription is interrupted . . . when the obligee commences action against the obligor, in a court of

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[2]477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986).

[3]*West v. Conrail*, 481 U.S. 35, 107 S.Ct. 1538 n. 4, 95 L.Ed.2d 32 n. 4[3b] (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 100 S.Ct. 1978, 1986, 64 L.Ed.2d 659 (1980).

> competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.

This case involves the first method of interruption, the commencement of an action against the defendant.

Article 421 of the Louisiana Code of Civil Procedure defines a civil action as "a demand for the enforcement of a legal right".[4] This article states that an action is "commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction".[5] This method of interruption of prescription focuses on the obligee's necessity to act within a limitation period, not on notice to the obligor, except in the sense that the filing of an action is notice. The act of filing iterrupts prescription and although service of process on the defendant may not be delayed indefinitely,[6] it need not occur within the limitation period.[7] Moreover, the pleading filed need not be free of technical deficiencies.[8] Louisiana courts have long recognized that a citation insufficient to serve as the basis for a judgment may nevertheless suffice for the purpose of inter-

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[4]La.Code Civ.Proc.Ann.art. 421 (West 1960).

[5]*Id.*

[6]*See* Comment, *Interruption of Prescription by Judicial Action in Louisiana*, 14 Tul.L.Rev. 601, 605 (1940).

[7]*See, e.g., Levron v. Bonin*, 448 So.2d 211 (La.Ct.App. 1st Cir.1984); *Taranto v.Cook*, 425 So.2d 1326, 1329 (La.Ct.App. 4th Cir. 1983). *Miller v. New Orleans Public Service, Inc.*, 250 So.2d 108 (La.Ct.App. 4th Cir.1971); *Lipps v. Zor, Inc.*, 170 So.2d 915 (La.Ct.App. 4th Cir.1965).

[8]Comment, *supra* note 6, at 606 (citing cases). *See also Lunkin v. Triangle Farms*, 208 La. 538, 23 So.2d 209 (1945).

rupting prescription.[9] This approach accords with the Louisiana rule that prescription statutes are construed strictly with ambiguities resolved in favor of preserving the cause of action.[10]

The liberal view of allowing imperfect pleadings to satisfy the commencement of action requirement and the law permitting service of process on the defendant after the prescriptive period has run is grounded in the civilian concept of the nature of liberative prescription. Liberative prescription bars legal actions to enforce a right where the ***holder of the right*** "has neglected to bring the action or exercise the right during a certain period of time".[11] As Baudry-Lancantinerie & Tissier point out, "[t]he basis for interruption of liberative prescription is not so much the knowledge of [or notice to] the debtor as the action of the creditor".[12] In the common law "the linchpin" may be "notice [to the obligor] and notice within the limitations period".[13] But in the civil law, the linchpin is "when the obligee commences action against the obligor, in a court of competent jurisdiction and venue". La.Civ.Code Ann. art. 3462.

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[9]*See, e.g., Phoenix of Hartford Ins. Co. v. U.S. Rubber Co.*, 245 So.2d 436 (La.Ct.App. 1st Cir.1970); *Babin v. Lyons Lumber Co.*, 132 La. 873, 61 So. 855 (1913);*Gueble v. Town of Lafayette*, 118 La. 494, 43 So. 63 (1907); *Satterly v. Morgan*, 33 La.Ann. 846 (1881).

[10]*See, e.g., St. Charles Parish School Bd. v. GAF Corp.*, 512 So.2d 1165, 1169 (La.1987); *United Carbon Co. v. Miss. River Fuel Corp.*, 230 La. 709, 89 So.2d 209 (1956).

[11]2 Aubry and Rau, Cours de Droit Civil Francais, § 475 (5th Ed.) (cited in 5 Civil Law Translations, Baudry-Lancantinerie & Tissier, Prescription § 26 at 15 (1972)).

[12]5 Civil Law Translations, Baudry-Lancantinerie & Tissier, Prescription, § 487 at 247 (1972). These commentators provide several examples of prescription being interrupted by a petition in justice that is not served on the interested party. *Id.*

[13]*Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 2385, 91 L.Ed.2d 18, 29 (1986).

Perhaps the quintessential example of Louisiana law allowing an obligee to protect his rights without having simultaneously to notify the obligor is the provision specifying that suit against one joint tortfeasor or solitary obligor interrupts prescription against all other joint tortfeasors or solitary obligors.[14] One justification suggested for dispensing with legal notice to unnamed joint tortfeasors is based on Louisiana's one-year prescriptive period for delictual actions. The interruption rule makes equitable the short limitation period by allowing a plaintiff to protect his rights against an unknown joint tortfeasor by bringing an action against the known defendant.[15]

Despite this policy of safeguarding a plaintiff's rights, there remains some confusion in Lousiaina case law regarding the effect on prescription of a petition containing a misdescription or misnomer of a defendant. We are mindful that some decisions applying Civil Code article 3462 and its predecessors and Code of Civil Procedure article 1153 may be construed as militating against a conclusion that the original petition interrupted prescription in this case.[16] Those cases are fac-

[14]La.Civ.Code Ann. art. 2324(C) (West Supp. 1989). *See Also Small v. Caterpillar Mfg. Corp.*, 319 So.2d 843 (La.Ct.App. 1st Cir. 1975); *Scharff v. Cameron Offshore Services, Inc.*, 475 F.Supp. 48 (W.D.La.1979).

[15]*See generally* Johnson, *Obligations, The Work of the Louisiana Appellate Courts for the 1972-1973 Term*, 34 La.L.Rev. 231, 235 & n. 25 (1974).

[16]See, e.g., Barnes v. Wall Shipyard,498 So.2d 74 (La.Ct.App. 4th Cir. 1986); *Catalano v. GSB Theatres of Chalmette, Inc.*, 480 So.2d 428 (La.Ct.App. 4th Cir.1985); *Majesty v. Comet-Mercury-Ford Co. of Lorain Mich.*, 296 So.2d 271 (La.1974); *Morgan v. Epps*, 356 So.2d 1027 (La.Ct.App. 1st Cir.1977); *Martin v. Mudd Supply Co.*, 119 So.2d 484 (La. 1960).

Article 1153 of the Louisiana Code of Civil Procedure addresses an issue related to the one presented by this case; when an amendment to a petition correcting a misnomer or changing a defendant relates back to the date the original petition was filed. The article, modeled on Fed.R.Civ.Proc. 15(c), provides:

> When the action or defense asserted in the amended petition

tually distinguishable, however, and some, such as *Majesty v. Comet-Mercury-Ford Co. of Lorain, Michigan,*[17] and its progeny[18] have been overruled by the Louisiana Supreme Court's decision in *Ray v. Alexandria Mall.*[19] Of the remaining viable decisions discussing this and the closely related issue of relation back of amended pleadings, a heavy majority support a finding that the plaintiff's petition naming "John Deere Corp." interrupted prescription against "Deere and Co."[20]

> or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing of the original pleading.

The *Schiavone* decision interpreted Fed.R.Civ.P. 15(c) in part as requiring the defendant to have received notice of the suit before the limitation period ran in order for an amendment correcting the name to relate back to the filing of the original petition. The seminal Loisiana Supreme Court decision applying La.Code Civ.Proc.Ann. art. 1153, *Ray v. Alexandria Mall,* 434 So.2d 1083 (La.1983), does not require prior notice. The Court noted, however, that an officer of the defendant company had in fact been served before prescription ran.

[17]296 So.2d 271 (La.1974).

[18]One such case, relied on heavily by Deere & Co. is *Small v. Caterpiller Mfg. Corp.*, 319 So.2d 843 (La.Ct.App. 1st Cir.1975).

[19]434 So.2d 1083 (La.1983). The *Ray* Court adopted a four-part test to determine whether an amendment altering the name of the defendant relates back to the original petition filing date. In doing so, the *Ray* Court overruled *Majesty v. Comet-Mercury-Ford Co. of Lorain, Mich.* which held that an amendment correcting a misnomer did not relate back to the date of filing of the original petition. At least one commentator has interpreted the *Ray* decision as leaving intact the Louisiana rule that if suit is filed in a court of competent jurisdiction and venue, service of process need not be made within the prescriptive period. Note, *Ray v. Alexandria Mall; Amending the Petition to Name a New Defendant,* 46 La.L.Rev. 179, 187 (1985).

[20]*See, e.g., Nini v. Sanford Bros. Inc., 276 So.2d 262 (La.1973); Peyton v. Torg Films Co.*, 370 So.2d 613 (La.Ct.App. 4th Cir.1979); *Stewart v. Maloney Trucking & Storage, Inc.*, 147 So.2d 62 (La.Ct.App. 4th Cir.1962); *Brooks v. Wiltz*, 144 So.2d 413 (La.Ct.App. 4th Cir. 1962). In *Garrett v. Diaz Drayage Co., ABC*, 442 So.2d 860 (La.Ct.App. 4th Cir. 1983) the plaintiff sued Diaz Drayage Company and its insurer, Fireman's

This case is factually similar to *Peyton v. Torg Films Co.*[21] In that case the plaintiff filed suit on a tort claim about two weeks before prescription would have run and named as a defendant "Torg Films Company". Service of process was attempted under the provisions of the Louisiana Long Arm Statute.[22] About three months later, in response to a declinatory exception of insufficient citation and service of process filed by "Torg Film Services, Inc.", the plaintiff amended his petition to correct the name of the defendant. The court, distinguishing the facts of *Peyton* from the then valid precedent of *Majesty v. Comet-Mercury-Ford Co. of Lorain, Mich.* held that the plaintiff's original petition interrupted prescription against the defendant, Torg Film Services, Inc. The court noted several facts that supported treating the misnomer as a nonfatal defect for the purpose of interrupting prescription. First, the defendant, Torg Film Services, Inc., was not qualified to do business in Louisiana and thus, the plaintiff could not have easily ascertained the correct name by making an inquiry of the Secretary of State. Second, the name used in the petition, "Torg Films Company", was very similar to the defendant's correct name, "Torg Film Services, Inc." Third, because Torg Films Company was not a separate legal entity

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Fund. The Correct name of the insured was Diaz Cartage Company. The trial court dismissed the insurer from the case. The plaintiff then filed an amended petition naming Diaz Cartage Company and the Fireman's Fund as the defendants — after the one year prescriptive period had run. The Court of Appeals held that "due to the striking similarity of names of the original named insured and the later named insured", prescription was interrupted as to Fireman's Fund, a joint tortfeasor, by the filing of the original suit and "prescription, having been interrupted, had not run at the time of the second amended petition", which corrected the misnomer. *Id.*

[21]370 So.2d 613 (La.Ct.App. 4th Cir.1979).

[22]La.Rev.Stat.Ann. §13:3201 (West Supp. 1989).

the plaintiff did not simply sue the *wrong* party. The court's ruling was in accordance with the policy of Louisiana courts not to penalize a plaintiff whose counsel makes a minor error causing no prejudice or injustice to the defendant, especially where some blame for the mistake rests with the defendant.[23]

As in *Peyton* the plaintiff in this case filed her original complaint about two weeks before the one-year tort prescriptive period would have run. The plaintiff's counsel first attempted service on a Louisiana corporation thought to be the defendant's instate agent for service of process. After this unsuccessful attempt and upon learning that Deere was not registered with the Secretary of State and did not have an instate agent for service of process, plaintiff's counsel served Deere through registered mail pursuant to the Louisiana Long Arm Statute. Like *Peyton,* this is not a case in which plaintiff's counsel could have easily ascertained the correct name of defendant. Not being able to obtain the name through the Secretary of State, the attorney used the name as it appeared on the tractor, "John Deere". The defendant argues, however, that the correct name could have been discovered by inspecting a serial number plate located on the transmission case inside of the then seven year-old tractor which reads: "John Deere Waterloo Tractor Works of Deere & Company, Waterloo,

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[23]*See, e.g., Jackson v. American Employers' Ins. Co.*, 202 La. 23, 11 So.2d 225, 226 (1942); *Stewart v. Maloney Trucking & Storage, Inc.*, 147 So.2d 62 (La.Ct.App. 4th Cir.1862); *Allstate Ins. Co. v. Manemin*, 280 So.2d 857 (La.Ct.App. 3d Cir. 1973); *Brooks v. Wiltz*, 144 So.2d 413 (La.Ct.App. 4th Cir.1962). *See also* Comment, *Interruption of Prescription by Judicial Action in Louisiana*, 14 Tul.L.Rev. 601, 607 (1940). Perhaps foreshadowing the approach ultimately adopted by Louisiana courts, the author of the comment wrote, "Article 3518 does require official notice, but it would seem that for the purpose of interrupting prescription, the better view would require no more than a *bona fide* attempt to satisfy all the technicalities of a judicial citation and a colorable compliance with them."

Iowa''. In the light of the large ''John Deere'' logo on the side of the ractor, the lack of any other readily visible label identifying the company, and the lack of registration with the state or appointment of an instate agent for service of process, we conclude that it would indeed be harsh to penalize the plaintiff for not crawling under the hood in search of evidence that the name on the outside was not the defendant's true corporate name. Apropos criticism by the defendant of the plaintiff's failure to discover the correct name of the defendant, the plaintiff wonders why the defendant referred to itself as an Illinois corporation in its removal petition and as a Delaware corporation in its answer to the complaint. The Court wonders why the defendant's removal petition was filed on behalf of John Deere Corporation. If John Deere Corporation is a nonentity then this case was removed by a nonentity, not by the defendant. These captious puzzlements have a bearing on this case in the limited sense that they carry to absurdity the defendant's argument, basically, that the plaintiff must suffer for her lawyer's mistake, one that the parties knew was an insignificant error in nomenclature.

As in the Torg Film Company/Torg Film Services Company (*Peyton*) case and as in the Diaz Drayage Company/Diaz Cartage Company (*Diaz*)[24] case, the name used here, John Deere Corp., is close to the defendant's correct corporate name, Deere & Company. It was close enough for the defendant to know that it was being sued. Moreover, this case, like *Peyton* and *Diaz*, is not one in which the plaintiff sued the wrong party; there are not two distinct legal entities involved. And Deere & Company has suffered no injustice or prejudice because of the amendment to the pleading.

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[24]*See supra* note 20.

III

Law is not a game of scrabble. The original timely filed petition naming John Deere Corp. as the defendant interrupted prescription against Deere & Company under Lousiana Civil Code article 3462. Louisiana and federal law regarding the relation back of an amendment to a complaint need not be addressed. Prescription had not run at the time the amended petition, correcting the minor misnomer, was filed.

We REVERSE the district court's grant of summary judgment to Deere & Company. We AFFIRM the district court's denial of the plaitniff's motion to add Gueydan Tractor Co. as a defendant. We REMAND the case to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4396

ELIZABETH M. HENSGENS,
Individually, Etc., ET AL.,

Plaintiffs-Appellants,

versus

DEERE & COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 12, 5 Cir., 1989, ____ F.2d ____)
(May 12, 1989)

Before WISDOM, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Couirt having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is aslo DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/s Garwood
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES AND FOR STAY OF THE

U.S. COURT OF APPEALS
FILED
MAY 12 1989
GILBERT F. GANUCHEAU
CLERK

APPENDIX B

Elizabeth M. HENSGENS, Individually and On Behalf Of the Minors, Karl Jude Hensgens, Brian Keith Hensgens, Catherine Elaine Hensgens, Mary Elizabeth Hensgens, Craig Robert Hensgens and Charles Hensgens, III, Plaintiffs-Appellants.

v

DEERE & COMPANY, et al., Defendants-Appellees.

No. 87-4251.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1987.

Appeal was taken from judgment of the United States District Court for the Western District of Louisiana, F.A. Little, Jr., J., entered in federal diversity action. The Court of Appeals, Reavley, Circuit Judge, held that: (1) addition of nondiverse defendant in federal action in which subject matter jurisdiction was originally based on diversity of citizenship defeated diversity jurisdiction and precluded trial court from entering judgment, but (2) district court could not add nondiverse defendant without balancing original defendant's interest in maintaining federal forum with competing interests in not having parallel lawsuits.

Vacated and remanded.

1. Federal Court — 287

Addition of nondiverse defendant in federal action in which subject matter jurisdiction was originally based on diversity

of citizenship defeated diversity jurisdiction and precluded trial court from entering judgment. 28 U.S.C.A. § 1447(c).

2. Federal Civil Procedure — 241

In federal diversity action, district court could not add nondiverse defendant without balancing original defendant's interest in maintaining federal forum with competing interests in not having parallel lawsuits. 28 U.S.C.A. § 1447(c); Fed. Rules Civ.Proc.Rules 15(a), 20, 28 U.S.C.A.

3. Federal Civil Procedure — 283
Removal of Cases — 102

When confronted with amendment to add nondiverse nonindispensable party in federal diversity action, district court should use its discretion in deciding whether to allow that party to be added; if court grants joinder, it must remand case to state court, but cannot remand if it denies joinder. 28 U.S.C.A. § 1447(c); Fed.Rules Civ.Proc.Rules 15, 15(a), 19, 28 U.S.C.A.

4. Federal Civil Procedure — 241

Addition of nondiverse party in federal diversity action must not be permitted without consideration of original defendant' interest in choice of forum; district court, when faced with amended pleading naming new nondiverse defendant in removed case, should scrutinize that amendment more closely than ordinary amendment. 28 U.S.C.A. § 1447(c); Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Lousiana.

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Elizabeth Hensgens, on behalf of herself and her minor children, appeals the grant of summary judgment for defendants Deere & Co. and Gueydan Tractor & Equipment Company ("Gueydan"). We vacate and remand.

I.

Charles Hensgens, Jr., Elizabeth's husband and the children's father, was killed on March 6, 1985 in an accident involving a John Deere Tractor. Elizabeth Hensgens (for herself and her minor children, all Louisiana citizens) brought suit against "John Deere Corporation" (an improper name) on February 25, 1986 in Louisiana state court. "Deere & Co." (the proper name) did not receive service until April 28, 1986. Deere (an Illinois corporation) then removed the case to federal court and Hensgens amended her complaint to change "John Deere Corporation" to "Deere & Co." In November, Hensgens moved to amend her complaint again to add Gueydan, the Louisiana corporation which sold the tractor, as a defendant.

Deere & Co. filed a summary judgment motion on the grounds that the one year Louisiana prescription period had expired. Based on *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the district court granted the motion and dismissed Deere & Co. as a defendant. The court then dismissed Gueydan on the same grounds.

II.

[1] For the first time on appeal Hensgens raises the issue of the district court's subject matter jurisdiction after Gueydan was added as a defendant. Timeliness does not matter, however, because subject matter jurisdiction cannot be waived. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir.1985).

Complete diversity of citizenship is a statutorily mandated rule that is almost as old as the Republic itself. *See Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267, 2 L.Ed. 435 (1806). Generally, jurisdiction is determined at the time the suit is filed. *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 786 (5th Cir.), *cert. denied*, 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296 (1974). So the court would have jurisdiction to decide a case even if the plaintiff failed to prove his federal question claim, *id.* at 786, or if the amount in controversy falls below the jurisdictional amount, *see, e.g., Garza v. Rodriguez*, 559 F.2d 259, 260 (5th Cir.1977), *cert. denied*, 439 U.S. 877, 99 S.Ct. 215, 58 L.Ed.2d 191 (1978), or if one of the parties changes its residency during the pendency of the suit, *Louisville N.A. & C. Ry. v. Louisville Trust Co.*, 174 U.S. 552, 566, 19 S.Ct. 817, 822, 43 L.Ed. 1081 (1899). *See generally, IMFC Professional Services of Florida v. Latin American Home Health, Inc.*, 676 F.2d 152, 157 (5th Cir.1982). However, addition of a non-diverse party will defeat jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

The principles of jurisdiction involving removed cases are similar to cases brought originally in the district court. Remand to state court, instead of dismissal, is the appropriate action if there is a lack of subject matter jurisdiction. Remand after removal is controlled by 28 U.S.C. 1447(c) which provides, in part:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

The statute provides the exclusive grounds for remand. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976). The language of 1447(c) does not mean that the court cannot consider post-removal developments. *In Re Merrimack Mutual Fire Ins. Co.*, 587 F.2d 642, 646 (5th Cir.1978); *IMFC Professional Services*, 676 F.2d at 157-58. Instead, the rule for remand is the same as original diversity jurisdiction. That is, most post-removal developments — amendment of pleadings to below jurisdictional amount or change in citizenship of a party — will not divest the court of jurisdiction but an addition of a non-diverse defendant will do so. *IMFC Professional Services*, 676 F.2d at 157-58.

In this case the district court lacked jurisdiction to enter the judgment from which the appeal is taken. The addition of Gueydan as a party defendant eliminated diversity, because there were Louisiana residents, Hensgens and Gueydan, on both sides. With complete diversity destroyed, the court had no subject matter jurisdiction to enter its subsequent orders.

Deere argues that jurisdiction is determined at the onsent of a suit and that subsequent events cannot defeat jurisdiction. Although it is true that most subsequent events will not defeat jurisdiction, addition of a nondiverse defendant will. *Kroger*, 437 U.S. at 374, 98 S.Ct. at 2403. Likewise, Deere's argument that post-removal events will never defeat jurisdiction must fail. *Merrimack*, 587 F.2d at 646; *IMFC Professional Services*, 676 F.2d at 157-58. Nor does the fact that Hensgens did not raise the issue until appeal make a difference. In *Grubbs v. General Electric Credit Corporation*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972), the Court held

> that where after removal a case is tried without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

But that rule has "no application to a case where at the time of judgment citizens of the same State were on both sides of the litigation." *Id.* at 704, 92 S.Ct. at 1348. Here, there were Louisiana residents on both sides of the litigation at the time of judgment.

III.

[2] Having decided that the district court did not have subject matter jurisdiction does not end our inquiry. We should next decide whether the district court's joinder of Gueydan was proper. Deere argues that the district court can only add a nondiverse indispensable party, *see* Fed.R. Civ.P. 19, and has no discretion to add a nondiverse permissive party after removal. Therefore, Deere urges us to treat the joinder of Gueydan as a nullity, but uphold the judgment as to Deere. Alternatively, Deere urges us to vacate the addition of Gueydan and have the district court proceed to judgment as to Deere alone. On the other hand, Hensgens argues that the district court properly allowed amendment to add Gueydan under Fed.R.Civ.P. 15. *See Desert Empire Bank v. Ins. Co. of North America*, 623 F.2d 1371 (9th Cir. 1980). Once Gueydan was joined, Hensgens concludes, the district court had to remand the case back to state court.

[3] We are confronted with competing interests. On one hand, there is the danger of parallel federal/state proceedings with the inherent dangers of inconsistent results and the waste

of judicial resources. On the other side, the diverse defendant has an interest in retaining the federal forum. Indeed, the removal statutes are predicated on giving the diverse defendants a choice of a state or federal forum. We conclude that the balancing of these competing interests is not served by a rigid distinction of whether the proposed added party is an indispensable or permissive party.[1] Instead, the district court, when confronted with an amendment to add a nondiverse nonindispensable party, should use its discretion in deciding whether to allow that party to be added. *Accord, Desert Empire Bank v. Ins. Co. of North America*, 623 F.2d 1371 (9th Cir.1980); *McIntyre v. Codman & Shurtleff*, 103 F.R.D. 619 (S.D.N.Y.1984); *Grogan v. Babson Brothers Co. of Illinois*, 101 F.R.D. 697 (N.D.N.Y.1984). If the court grants the joinder, it must, under 1447(c) and *Thermtron* remand the case to state court. If it denies the joinder, it cannot remand.

[4] Because the court's decision will determine the continuance of its jurisdiction, the addition of a nondiverse party must not be permitted without consideration of the original defendant's interest in the choice of forum. The district court, when faced with an amended pleading naming a new nondiverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment. Rule 15(a)

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[1]Contrary to Deere's assertion, we are not compelled by *Merrimack's* implication that only indispensable parties may be added, to hold otherwise. That implication in *Merrimack*, 587 F.2d at 647 & 647 n. 8, was dictum since the court's holding, not issuing the writ of mandamus which allowed the remand order to stand, did not in any way depend on that implication. *See IMFC Professional Services*, 676 F.2d at 159 n. 14 (recognizing the *Merrimack statement as dictum and stating "[w]e reserve for decision when the issue is squarely presented whether a district court may allow joinder of a nondiverse party who is not indispensable even though such joinder may result in remand."). Since the Merrimack* implication was dictum, we are not bound by it. *Cosden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, 1070 n. 7 (5th Cir. 1984); *Curacao Drydock Co. v. M/V Akritas*, 710 F.2d 204 (5th Cir. 1983).

of the Federal Rules of Civil Procedure provides that leave to amend "should be freely given when justice so requires," and Rule 20 permits joinder of proper parties. In this situation, justice requires that the district court consider a number of factors to balance the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits. For example, the court should consider the extent to which the purpose of the amendent is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities. The district court, with input from the defendant, should then balance the equities and decide whether amendment should be permitted. If it permits the amendment of the nondiverse defendant, it then must remand to the state court. If the amendment is not allowed, the federal court maintains jurisdiction.

This record indicates that the problem of the addition of the nondiverse defendant was not recognized by the court or the parties, and the addition of Gueydan as a defendant was permitted as a routine matter. We, therefore, not only vacate the judgment for lack of subject matter jurisdiction but also vacate the order permitting amendment. We remand to the district court to consider whether justice requires Hensgens to amend to add Gueydan.[2] If so, the court must remand the whole case to state court. If not, the court should not permit amendment and the case should proceed against Deere & Co. as the sole defendant. We express no opinion on the district court's disposition of the claim against Deere & Co. and its holding on the relation back issue.

VACATED and REMANDED.

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[2]The district court is, in this case, the best place to originally decide the equities involved. *Compare Desert Empire Bank*, 623 F.2d at 1374-77 (balancing the equities on appeal).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

ELIZABETH M. HENSGENS, et al.
CIVIL ACTION NO. 86-1103

-vs-

SECTION "O" (JUDGE LITTLE)
JOHN DEERE CORPORATION, et al.
Magistrate Overcash

RULING

The plaintiffs' decedent was killed in a tractor accident on 6 March 1985. On 25 February 1986 plaintiffs' petition was filed in the 15th Judicial District Court, State of Louisiana. The sole defendant was the tractor's manufacturer, erroneously described as John Deere Corporation. The defendant perfected removal to this court, invoking diversity jurisdiction, on 27 May 1986. Subsequent to responsive pleadings filed by Deere & Company an amended complaint was filed by the plaintiff on 6 November 1986 adding as a corporate defendant the retail seller of the tractor, Gueydan Tractor & Equipment Company, a Louisiana corporation.

A motion for summary judgment was granted in Deere & Company's favor based upon the reasoning of *Schiavone v. Fortune,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and Gueydan Tractor was also dismissed for the same reason. An appeal followed. The Fifth Circuit, in vacating both the order authorizing the amended complaint and the judgments of dismissal, did not pass upon the applicability of *Schiavone.* Instead, this Court was directed to determine whether, under Fed. R. Civ. P. 15, the plaintiffs are entitled to amend their

complaint to deprive the defendant of its federal removal forum by the addition of a nondiverse defendant, Gueydan Tractor. Before the Court is the plaintiffs' motion to amend.

Amended and supplemental pleadings are governed by Fed. R. Civ. P. 15(a), which provides that after a responsive pleading has been filed "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice requires." The Fifth Circuit directed that a "district court, when confronted with an amendment to add a nondiverse nonindispensable party, should use its discretion in deciding whether to allow that party to be added." *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987) (citations omitted). The exercise of that discretion involves the balancing of competing interests.

> On one hand, there is the danger of parallel federal/state proceedings with the inherent dangers of inconsistent results and the waste of judicial resources. On the other side, the diverse defendant has an interest in retaining the federal forum. Indeed, the removal statutes are predicated on giving the diverse defendants a choice of a state or federal forum. We conclude that the balancing of these competing interests is not served by a rigid distinction of whether the proposed added party is an indispensable or permissive party.

Id. In attempting to amend a pleading to add a nondiverse defendant in the removal context, close scrutiny must be given to the following factors:

(1) the extent to which the purpose of the amendment is to destroy diversity;

(2) whether plaintiff has been dilatory in seeking the amendment;

(3) whether plaintiff will be significantly injured if the amendment is not allowed; and,

(4) any other factors bearing on the equities.

Id. The Court requested that plaintiffs' reurge their motion to amend the complaint and invited opposition from the defendants. As expected, the motion to amend was filed and opposed. The issue was thoroughly briefed by the parties. More than ordinary scrutiny has been employed by the Court in applying its discretion and balancing the equities.

Examining the record in light of the factors previously recited, it becomes clear that plaintiffs' failure to include Gueydan Tractor as a party defendant in the original petition for damages was a conscious decision made by the plaintiffs. The reason for the failure is set out in the brief filed by plaintiffs' counsel which brief accompanied the proffered amended complaint.

> [T]he addition of GUEYDAN TRACTOR AND EQUIPMENT COMPANY was done after the original petition was filed because the plaintiffs did not desire to bring suit against GUEYDAN TRACTOR AND EQUIPMENT COMPANY earlier. This is so because the owners of GUEYDAN TRACTOR AND EQUIPMENT COMPANY were personal friends of plaintiffs. Plaintiffs were reluctant to originally name GUEYDAN TRACTOR AND EQUIPMENT COMPANY as a defendant.

(Plaintiffs' Memorandum in Support of Motion to File Amended Complaint at 4-5). The memorandum states that it was plaintiffs' counsel who persuaded plaintiffs to join Gueydan Tractor.

The inescapable conclusion is that plaintiffs have been dilatory. The plaintiffs waited nearly nine months before attempting to join Gueydan Tractor with no explanation as to why, once the case was removed, they were able to over-

come their personal feelings and sue Gueydan Tractor. This is not a case in which the corporate defendant or its participation in the alleged tort was unknown. When no other reason is advanced for amending the complaint, the spectre of joinder for the purpose of destroying diversity raises its ugly head. Furthermore, any harm befalling plaintiffs because of their inability to join Gueydan Tractor at this late date is of their own doing. Plaintiffs chose not to sue the vendor initially. Nine months later a mind change occurred. Against the plaintiffs' voluntary and informal decision of noninclusion must be balanced the right of a removing defendant to defend his case in federal court. The courts will act to protect a defendant's right to a federal forum. *See, e.g., Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 27 S.Ct. 184, 51 L.Ed. 430 (1907); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976).

The plaintiffs have not advanced an excuse for their tardiness. While recognizing the liberal amendment policy embodied in Rule 15, the standard for amending in a removed case is more stringent. *Hensgens*, 833 F.2d at 1182. Mere caprice, or worse, is not sufficient to deny Deere its federal forum at this late date.

The motion to amend is DENIED.

SIGNED in Alexandria, Louisiana on 10 March 1988 .

/s/ F.A. Little, Jr.
F.A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAR 11 1988
ROBERT H. SHEMWELL, CLERK
BY /s/ [illegible]
DEPUTY

COPY SENT
DATE 3/11/88
BY [illegible]
TO: Schiff/Watson
Roy McElligott

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ELIZABETH M. HENSGENS, et al.
CIVIL ACTION NO. 86-1103

-vs-

SECTION "O" (JUDGE LITTLE)
JOHN DEERE CORPORATION

RULING

Deere and Company seeks to reurge a motion for summary judgment, the basis of which is prescription. Because the Court, after examining the legal memoranda and supporting documents, remains convinced of correctness of an earlier motion decided on the same grounds, a portion of the prior ruling will be incorporated into the present one.

Plaintiffs are the surviving spouse and children of Charles Hensgens, Jr. Hensgens was killed when a tractor allegedly misfunctioned. The unfortunate event occurred on 6 March 1985. Believing the offender to be John Deere Corportion, plaintiffs sued that company by filing suit in Louisiana state court on 25 February 1986, well within the Louisiana one-year prescriptive period.

Service was attempted on the named defendant by use of the Louisiana Long Arm Statute. The pleadings and associated documents were received in the office of Deere & Company on 28 April 1986. Louisiana attorneys for Deere & Company filed an exception to the process alleging (and never denied by plaintiffs) that John Deere Corporation is not and has never

been an entity of any sort. In June the plaintiffs amended their petition and named the proper defendant. Service was perfected on Deere & Company on 9 June. After removal to this Court defendant filed a motion for summary judgment. The issue is prescription.

The accident occurred on 6 March 1985. The suit was filed against a nonexistent defendant on 25 February 1986. The proper defendant, Deere & Company, received notice of the suit on 28 April 1986 and again on 9 June 1986, subsequent to the amendment. With those pertinent facts at hand we must determine if this case has prescribed.

No doubt the initial filing occurred well within the prescriptive period but the pleadings filed were infirm. The named defendant was a nonentity. The amended petition cured the defect by naming the proper corporate defendant but did that amendment resuscitate the lawsuit by relating back to the date of filing of the original petition. Rule 15(c) of the Federal Rules of Civil Procedure provides the law and the courts have provided the interpretation of that law. The Rule states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In the case *sub judice* there is no dispute that the claim asserted in the amended petition arose out of the conduct described in the original pleading. The difficulty occurs when the amendment brings in a party not originally joined. The safe harbor of relation back applies if the new party receives the notice of the suit within the prescriptive period and knew or should have known that but for the improper designation the suit would have been brought against him. A literal reading of the Rule would lead one to conclude that the case has prescribed. The proper defendant did not have notice within the prescriptive period.

The Courts of Appeal have dabbled in the interpretation of the Rule in light of a myriad of different fatual scenarios. The results are not uniform. It would serve no useful purpose to add to the weight of this decision by analyzing all case law and in particular the guidelines from the Fifth Circuit. That is so because we believe that the issue has been resolved by a recent Supreme Court case. We are compelled to follow the effulgence emanating from *Schiavone v. Fortune*, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). Briefly, the *Fortune* facts are these. Plaintiff filed an action against Fortune on 9 May 1983. Plaintiff claimed he was libled in a publication of 31 May 1982. The agent for service of process for Time, Inc. received the pleadings on 23 May 1983 but refused service as Time, Inc. was not a named defendant. The pleadings were amended to name the proper defendant, Time, Inc., and service was obtained on 21 July 1983. There is no legal entity named "Fortune," which was the only named defendant in the pleadings as filed initially. The issue there, as here, was whether the amended petition filed against the proper defendant related back to the filing of the initial petition so that the prescriptive period would be interrupted.

According to the *Fortune* reasoning, the protection of the

relation back umbrella requires satisfation of each tine of a four-prong test:

1. The basic claim must have arisen out of the conduct set forth in the original pleading;
2. The party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense:
3. That party must or should know that, but for a mistake concerning identity, the action would have been brought against it; and
4. The second and third requirements must be fulfilled within the prescribed limitations period.

Fortune, supra at 27. The plaintiffs have not satisfied the fourth requirement even if it is assumed that the first three have in fact been satisfied. "The linchpin is notice and notice within the limitations period." *Fortune, supra* at 29. Deere & Company did not have notice of the action within the prescriptive period. No judicial interpretation massage of the very clear and unambiguous language of the Rule is necessary. This conclusion is consistent with and is mandated by the *Fortune* holding, which holding brings to an end the conflict among the Courts of Appeal.

The filing of the amended complaint cannot relate back to the original, and timely, filing date. The motion of Deere & Company for summary judgment is GRANTED.

SIGNED in Alexandria, Louisiana on 10 May 1988.

/s/ F.A. Little, Jr.
F.A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 10 1988
ROBERT H. SHEMWELL, CLERK
BY /s/ TW
DEPUTY

ATTEST: A TRUE COPY
DATE: 5-11 1988
ROBERT H. SHEMWELL, CLERK
By /s/ Randi M. McMullen
Deputy Clerk, U.S. District Court
Western District of Louisiana

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ELIZABETH M . HENSGENS, et al.
CIVIL ACTION NO. 86-1103

-VS-

SECTION "O" (JUDGE LITTLE)
JOHN DEERE CORPORATION

J U D G M E N T

For written reasons assigned this date, defendant's motion for summary judgment is GRANTED. Plaintiff's claim is DISSMISSED WITH PREJUDICE.

SIGNED in Alexandria, Louisiana on 10 May 1988.

/s/ F.A. Little Jr.
F.A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 10 1988
ROBERT H. SHEMWELL, CLERK
BY /s/ TW
DEPUTY

Judgment Entered 5-11-88
By /s/ om
Copy To Schiff & Watson
Roy
McElligott

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ELIZABETH M. HENSGENS, et al.
-vs- CIVIL ACTION NO. 86-1130-O
JOHN DEERE CORPORATION

RULING

An order in this cause was issued 16 January 1987 in response to the defendant's motion for summary judgment. At that time the Court requested enlightenment from the parties on the issue of the retroative application of *Schiavone v. Fortune*, ____ U.S. ____, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). After consideration of the memoranda submitted, it is the opinion of this Court that *Schiavone* may be applied retroactively to bar the plaintiffs' claim.

The answer to the retroactivity question is provided by *Antoine v. United States Postal Service*, 781 F.2d 433 (5th Cir. 1986). In *Antoine*, a Title VII Plaintiff timely filed her request for a court appointed attorney and her right-to-sue letter, but no formal complaint was filed. An attorney was appointed with about one week remaining in the 30-day limitations period, and as a consequence, a complaint was not filed until 51 days later.

Initially, the district court denied the defendant's motion to dismiss for untimeliness based upon Fifth Circuit jurisprudence. *See e.g. Neal v. I.A.M. Local Lodge 2386*, 722 F.2d 274 (5th Cir. 1984). An action was considered commenced for purposes of the Federal Rules of Civil Procedure on the day the right-

to-sue letter was filed. Therefore, the formal complaint could relate back to the original filing date and thus be timely. *Antoine*, 781 F.2d at 435-436. The Postal Service filed a motion for reconsideration based upon a recently decided Supreme Court case. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) held that right-to-sue letter cannot commence a Title VII action under Fed. R. Civ. P.3 unless it also fulfills the Rule 8(a) requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." Since a right-to-sue letter contains no statement of the claim, *Brown* held that it was insufficient to commence a suit.

Although Mrs. Antoine's procedural problems arose prior to the *Brown* decision, the Fifth Circuit applied *Brown* retroactively and dismissed her case. *See also Firle v. Mississippi State Department of Education*, 762 F.2d 48 (5th Cir. 1985). So too must *Schiavone* be applied in the instant case to bar the plaintiffs' claim.

To resolve the retroactivity issue, the Fifth Circuit applied the three factors outlined in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Court must ask:

1. Does the decision establish a new principle of law, either overruling past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

2. Whether retroactive operation will further retard the operation of the decision in question in light of its prior history, purpose and effect.

3. The inequity imposed by retroactive application.

As a general proposition, the law applied is that which is in effect at the time of the decision. *Gulf Offshore Co. v. Mobil*

Oil Corp., 453 U.S. 473, 486, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1984).

Prior to *Schiavone*, the Supreme Court had not given a definitive answer to the problem of relation back under Fed. R. Civ. P. 15(c) when an improper defendant, named in a suit timely filed, was not served until the expiration of the prescriptive period. The clear wording of 15(c) states that the addition of the correct party may only relate back to the original filing date if the party named in the complaint (i.e. the improper party) received notice during the limitations period. Although the circuit courts were split on the interpretation of 15(c), with the Fifth Circuit espousing a broad appliction, *see e.g. Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980), the rule of *Schiavone* cannot be said to be either "a new principle of law" or one "overruling past clear precedent." *Chevron Oil v. Huson*, 404 U.S. at 106-107; *Antoine*, 781 F.2d at 437, n. 5; *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983). Additionally, many courts have applied *Schiavone* retroactively. *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986); *Firle, supra; Gonzales v. Secretary of the Air Force*, 638 F.Supp. 1323 (N.D. Tex. 1986).

Certainly, retroactive operation of the rule will further the operation of the decision. Retroactive application of *Schiavone* will inform potential plaintiffs and the bar of the requirements for timely filing and service upon appropriate parties, thereby preventing dismissal of otherwise meritorious claims. Imposition of the *Schiavone* rule can likewise not be said to raise a serious issue of inequity. The dismissal of this action stems from an error that a conscientious inquiry could have avoided. The correct name of the defendant in this instance was easily ascertainable, thus no inequity can be said to result from the retroactive operation of a rule requiring a plaintiff to name a defendant properly.

Based upon the foregoing, the defendant's motion for summary judgment is GRANTED and the plaintiffs' claim is DISMISSED.

SIGNED in Alexandria, Louisiana on 18 February 1987.

/s/ F.A. Little Jr.
F.A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 19 1987
ROBERT H. SHEMWELL, CLERK
By /s/ WRG
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COPY SENT
DATE 2-20-87
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TO: Schiff & Watson
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McElligott

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ELIZABETH M. HENSGENS, et al.

-vs- CIVIL ACTION NO. 86-1130-O

JOHN DEERE CORPORATION

J U D G M E N T

For written reasons assigned this day, it is

ORDERED that defendant's motion for summary judgment is GRANTED and plaintiff's claim is DISMISSED with prejudice.

SIGNED in Alexandria, Louisiana on 18 February 1987.

/s/ F.A. Little Jr.
F.A. LITTLE, JR.
UNITED STATES DISTRICT
JUDGE

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 19 1987
ROBERT H. SHEMWELL, CLERK
BY /s/ WRG

Judgment Entered 2-20-87
By /s/ om
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